THE RECORD

OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

VOLUME FIVE

1950

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Volume 5 — January 1950 — *Number 1*

Association Activities

YALE LAW SCHOOL won the fourth annual moot court competition sponsored by the Committee on Junior Bar Activities, of which Alfred P. O'Hara is the chairman. The competition was held at the House of the Association on December 1 and 2. Runner-up was the University of Chicago team. The bench which awarded the Samuel Seabury Prize to the winning team consisted of Justice Felix Frankfurter, President Robert P. Patterson, Judge Samuel Seabury, John W. Davis, and Harrison Tweed. Over five hundred spectators witnessed the final arguments. The members of the winning team were John D. Mosser, Elliot E. Vose, Edgar A. Zingman, and Thomas A. Shaw, Jr., alternate. Their opponents were Arnold M. Chutkow, Herbert C. Ephraim, and Cornelius W. Gillam.

The semi-final round was judged by two courts, consisting of Judges Edward A. Conger, William C. Hecht, Jr., James B. M. McNally, Gregory F. Noonan, William T. Powers, and James Garrett Wallace. The teams competing in this round were the University of Chicago v. Columbia and the University of Virginia v. Yale.

In the first and second rounds, judged entirely by practicing

lawyers, the teams competing in the second round were St. John's v. University of Chicago, Cornell v. Yale, Columbia v. Brooklyn Law School, and the University of Virginia v. the University of Michigan. In the first round the pairings were as follows: University of Pennsylvania Law School v. University of Chicago Law School, Albany Law School v. University of Michigan Law School, Cornell Law School v. New York University School of Law, Catholic University of America School of Law v. Brooklyn Law School, Fordham University School of Law v. Columbia University School of Law, Temple University School of Law v. Yale Law School, University of Virginia Department of Law v. Northeastern University School of Law, University of Buffalo School of Law v. St. John's University School of Law. Boston College Law School argued the side of the appellant *amicus curiae* in the Buffalo-St. John's competition.

The case argued in all four rounds involved constitutional questions raised by a confession obtained from the defendant while he was allegedly detained illegally by the police. Since it was an inter-law school competition no decision was given in any court on the law. The winners were judged on the effectiveness of their oral presentation and on their briefs. The law students representing the seventeen schools were entertained at dinner on both nights of the competition by the Committee on Junior Bar Activities and were also entertained at luncheons by several law firms. The success of the competition has suggested to the Junior Bar Committee the possibility of organizing the competition on a regional basis in an attempt to cover the entire country.

THE SPECIAL COMMITTEE on the Unification of the Courts, Porter R. Chandler, chairman, was represented at public hearings held by the Judicial Council at the House of the Association on December 9. President Robert P. Patterson read the following statement at the hearings, and Porter R. Chandler presented the Association's views, as set forth in a report adopted at the Stated

Meeting of the Association on January 18, 1949. Judge Patterson's statement follows:

"The present condition of court delays in this City is both appalling and disgraceful. The need for reform is urgent.

"Your own official figures tell the story better than anything I can say. According to those figures, in every one of the five Boroughs in greater New York the delay in the Tort Jury Calendar in the Supreme Court runs from a minimum of a year and a half in the Bronx and Richmond to nearly three years in Manhattan. What is more, in every Borough the situation is steadily getting worse instead of better. In June of 1948 a plaintiff in the Borough of Manhattan had a chance of getting his case tried, if his lawyer acted promptly, in a little less than two years from the time of the accident. Today he will wait nearly three years. This is not a condition which we can expect that time will remedy for us. It is not merely a post-war phenomenon, although it has, of course, been greatly aggravated by post-war inflation. It is, I think, a normal development from the great increase in the scope of tort liability generally and the constant growth of casualty insurance.

"We have enough judges to handle the situation, but they are scattered in too many courts and there are too many restrictions on their jurisdiction. While the Supreme Court is overwhelmed with work, other courts do not have enough to do. Consequently, some judges are overworked, while others have time on their hands.

"I do not need to tell you that justice delayed is justice denied. The person who is hurt by the present situation is the plain citizen much more than the lawyer. Our Association feels a grave responsibility in this matter. A year ago we appointed a Special Committee to see what could be done. That Committee recommended a plan for the consolidation and streamlining of the courts so as to eliminate wasteful overlapping and unnecessary jurisdictional limitations which now freeze our judges into compartments where they cannot function efficiently. The Committee's report was adopted by our Association at its Stated Meeting on January 18, 1949. The New York County Lawyers Association—the largest bar association in the City—took similar action at the same time. Proposals for constitutional amendments designed to carry out those recommendations were introduced in the Legislature. After considerable amendment, they passed the Senate but failed by a narrow margin in the Assembly.

"Our Association still believes that the recommendations which we then made represent the best method of dealing with this grave situation. The passage of a year's time has merely served to emphasize the urgency of the need.

"I realize that various alternative proposals have been suggested in other quarters. All of them, like the proposal advocated by our Association, will require constitutional amendments. I doubt whether any of them in the long run would be as satisfactory as a thoroughgoing streamlining of the

courts along the lines which we suggested. If I may say so, I think the Judicial Council is to be commended for its action in holding these hearings where all views can be presented and conflicting ideas ironed out.

"I do want to leave with you the thought that it is absolutely essential that a thoroughgoing proposal be prepared and submitted to the Legislature at its next session, to the end that the people of this City will be afforded relief from the intolerable situation which now exists and is growing worse every day."

THE COMMITTEE on State Legislation, John F. Dooling, Jr., chairman, held its organization meeting on December 19. An innovation in the Committee's procedure will be the establishment of a system of screening bills, by which it is hoped that the Committee will be able to publish in its bulletins reports on bills of greater importance and all bills which have a greater chance of passage. At the organization meeting Professor John W. MacDonald, executive secretary of the Law Revision Commission, discussed legislative procedure.

AT A DINNER in honor of Chief Judge Learned Hand on the occasion of the Fortieth Anniversary of his service as a Federal Judge the following letters from President Truman, Chief Justice Vinson, and Attorney General McGrath were read. The dinner was tendered by the Foley Square Heads, an organization of lawyers who formerly served in the office of the United States Attorney for the Southern District. With the permission of that organization the letters are published:

THE WHITE HOUSE
WASHINGTON

November 14, 1949

My dear Judge Hand:

It is with some diffidence that I extend to you my sincere congratulations on your fortieth anniversary as a federal judge, your twenty-fifth as a judge of the Court of Appeals for the Second Circuit, and your tenth as senior and Chief Judge of that court.

I have said that I write you with some diffidence; I do so partly because I

know you well enough to fear that even as to the subject of this letter you might insist that judgment be reserved. But I shall run the risk of your dissent by expressing my sincere belief that your service to this Nation and its people stands as a lesson of openmindedness, austere judgment, and courageous conviction that must never be forgotten.

Some of our younger lawyers tell me that when, during and immediately after their law school training, it became known to them that the name Learned Hand, found so often in their casebooks, was not only a legend but also a living reality, the surprise was great. But even more gratifying was their coming to share with those of us who have known you longer the sense of happy realization that in our own generation live men of such certain distinction as need not await the judgment of history.

I am glad to join in this tribute to a great citizen and a great judge.

Very sincerely yours,

HARRY TRUMAN

Honorable Learned Hand
Chief Judge
United States Court of Appeals
for the Second Circuit
New York, N. Y.

SUPREME COURT OF THE UNITED STATES
WASHINGTON 13, D. C.

Chambers of
THE CHIEF JUSTICE

November 15, 1949

Dear Judge Hand:

I welcome the opportunity to express my warm regard for you, and to convey my estimate of the place you occupy in the minds and hearts of your brothers of the federal bench. In short space, it is difficult to express adequately my feelings or those for whom I speak.

Many have been the times, during more than eight years on the federal bench, I have heard counsel, after citing a Court of Appeals decision, add that "The opinion in that case was written by Judge Learned Hand." And, many Supreme Court opinions similarly add authority to the citation of a Court of Appeals opinion with the statement that Learned Hand was its author. Lawyers and judges seek to enlist Judge Hand on their side of a legal controversy because a wisdom, such as yours, born of great learning and experience lends effective content to argument and decision.

Yet, with all your experience and learning, yours is not the glib and confident approach to the problems of the law, but a searching, painstaking analysis in which doubts and uncertainties are not shrugged aside. They are faced and the limitations of the result reached are set out for all to see. It

is precisely this integrity of spirit that makes your decisions the guideposts they have become for lawyers and judges everywhere. Your doubts become our doubts and spur us on to further study. Whether we agree with your conclusions or not, you compel us to wrestle with the problems as you have done.

In administrative matters as well, I have found you ever interested, able and forceful. It has been one of my most pleasant privileges to sit with you at the Judicial Conference table. The administration of justice throughout the country has benefited much from the sage counsel and courageous action that mark your participation in the work of the Judicial Conferences.

Mr. Justice Frankfurter has acknowledged you as "one at whose feet I sat almost from the time I came to the bar and at whose feet I still sit." May I echo that tribute—as an individual sentiment, and as representing the affection and esteem in which you are held by judges and lawyers throughout the land. You are the dean of federal judges in point of service to the nation. You are first in the hearts of your brothers.

Sincerely,

FRED M. VINSON

Honorable Learned Hand
Chief Judge,
United States Court of Appeals
for the Second Circuit,
New York, New York.

OFFICE OF THE ATTORNEY GENERAL

WASHINGTON, D. C.

November 15, 1949

Honorable Learned Hand
Chief Judge
United States Court of Appeals
New York, New York

My dear Judge Hand:

It is with sincere pleasure that I join with the Foley Square Heads in felicitating you on this delightful occasion.

The testimonial in your honor, on November 15, is a most fitting recognition of the renowned service that you have rendered to your country as a distinguished jurist while gracing the Federal bench during the past forty years, a quarter of century of which has been on the United States Court of Appeals, and the recent ten years as Chief Judge.

Hailed as the Blackstone of the twentieth century, your exemplification of the spirit of justice has contributed immeasurably in strengthening respect for the law and the courts of our land—bulwarks of our liberty. Your diligent

and faithful study of the law and its application to human affairs has achieved for you a lofty position rarely matched in the annals of the judiciary.

Wise, kindly and modest, one of your most precious possessions, I feel sure, is the love, the esteem and the veneration of your colleagues on the bench, members of the bar and laymen everywhere.

I am deeply sorry that I am unable to be with you on this happy occasion, and personally convey my warm feelings and fondest wishes. May God bless you with continued wisdom and vigor to carry on your labors in the vineyard of the law.

Sincerely,

J. HOWARD MCGRATH
Attorney General

AT ITS FIRST meeting the International Law Committee, A. A. Berle, Jr., chairman, decided to study various definitions of aggression and also to continue its consideration of the various drafts of the Covenant on Human Rights. The Committee will also cooperate with the Special Committee on Atomic Energy in studies relating to the international control of atomic energy.

REGINALD HEBER SMITH, Director of the Survey of the Legal Profession, financed jointly by the Carnegie Corporation and the American Bar Association, will discuss some of the findings made by the Survey at the January meeting of the Section on the Economics of the Legal Profession. Mr. Smith will also report on the study made of lawyer reference plans, as outlined in a manual prepared by the Survey and released recently.

AT ITS FIRST meeting of the year the Special Committee on Public and Bar Relations, The Honorable Samuel I. Rosenman, chairman, reviewed the In-Service Training Course for Teachers, which is under the direction of a working committee with former Supreme Court Justice Paxton Blair as chairman. The Committee studied the transcripts of the lectures being given at the course, and it was decided that the lectures were of sufficient im-

portance so that transcripts should be made of all lectures in the course with the thought that they might be published.

The attendance at the course has averaged about five hundred teachers, and the Board of Superintendents have reported that they are satisfied with the way the course is conducted. The lecture course will close with a discussion of the Bill of Rights by Whitney North Seymour on January 12.

THE COMMITTEE on the City Court of the City of New York, Lester E. Denonn, chairman, has under consideration proposed amendments and changes in the City Court Rules. The object of the new rules is to eliminate useless and inconsistent provisions of the old rules and harmonize them with present-day conditions in the Court. The most striking features of the new rules are those dealing with calendar practice and the abolition of the Friday call calendar. It is proposed to print more detailed calendar information in the New York Law Journal and notify interested lawyers by telephone several days prior to a case appearing on the day calendar.

THE COMMITTEE on Labor and Social Security Legislation, Herbert W. Haldenstein, chairman, has under study the question of compulsory arbitration of labor disputes affecting the public health or safety, and also the question of the applicability of anti-monopoly laws to labor unions. Other matters which the Committee has under consideration are the problem of relegating to the State Labor Relations Boards industrial disputes which are primarily intra-state; revisions in the procedural regulations of the National Labor Relations Board; and anti-injunction statutes.

The Calendar of the Association for January

(As of December 22, 1949)

January 3 Joint Meeting of Section on State and Federal Procedure and Section on Trials

January 4 Dinner Meeting of Executive Committee
Meeting of Section on Wills, Trusts and Estates
"On Trial"—Radio Program, WJZ (770), 10:30 P.M.

January 5 Meeting of Section on Labor Law
Meeting of Committee on Unlawful Practice of the Law
Teachers In-Service Training Lecture. Speaker: The Honorable Jerome N. Frank. 4:00 P.M.

January 6 Twelfth-Night Festival, 8:15 P.M.
"On Trial"—Television Program, WJZ–TV (Channel 7), 9:30 P.M.

January 9 Dinner Meeting of Committee on Federal Legislation
Dinner Meeting of Committee on Real Property Law

January 10 Dinner Meeting of Committee on Copyright
Meeting of Section on the Economics of the Legal Profession
Meeting of Subcommittee of Committee on Trade Regulation and Trade-Marks

January 11 Dinner Meeting of Committee on Insurance Law
Dinner Meeting of Committee on Professional Ethics
"On Trial"—Radio Program, WJZ (770), 10:30 P.M.

January 12 Meeting of Section on Taxation
Teachers In-Service Training Lecture. Speaker: Whitney North Seymour. 4:00 P.M.

January 13 "On Trial"—Television Program, WJZ–TV (Channel 7), 9:30 P.M.

January 16 Meeting of Special Committee on Public and Bar Relations

January 17 *Stated Meeting of Association and Buffet Supper*—6:15 P.M.
Meeting of Committee on International Law
Meeting of Committee on State Legislation

January 18 Dinner Meeting of Committee on Administrative Law
Meeting of Committee on Admissions
Meeting of Special Committee on Broadcasting
Joint Meeting of Section on Corporations and Section on the Drafting of Legal Instruments
"On Trial"—Radio Program, WJZ (770), 10:30 P.M.

January 20 "On Trial"—Television Program, WJZ–TV (Channel 7), 9:30 P.M.

January 23 Dinner Meeting of Committee on Medical Jurisprudence
Dinner Meeting of Committee on Municipal Affairs
Meeting of Section on Trade Regulation

January 24 Meeting of Committee on the City Court
Meeting of Committee on State Legislation
Meeting of Section on Trials and Appeals

January 25 "The Work of the Court of Appeals." Speaker: The Honorable Bruce Bromley, Former Judge, Court of Appeals of the State of New York. *Buffet Supper*, 6:15 P.M.
"On Trial"—Radio Program, WJZ (770), 10:30 P.M.

January 27 Annual Meeting of New York State Bar Association
"On Trial"—Television Program, WJZ–TV (Channel 7), 9:30 P.M.

January 28 Annual Meeting of New York State Bar Association

January 30 Meeting of Library Committee
Round Table Conference. Speaker: The Honorable Irving L. Levey, Justice of the Supreme Court of the State of New York

January 31 Meeting of Committee on State Legislation

Congressional Oversight of Administrative Agencies

A REPORT OF THE COMMITTEE ON ADMINISTRATIVE LAW

The following report was drafted by a 1948–9 subcommittee under the chairmanship of Beryl H. Levy, and has been the subject of detailed discussion and revision by a 1949–50 subcommittee under the chairmanship of Francis Currie and, in both years, by the full Committee. The report is now presented as a preliminary attempt to formulate principles and considerations applicable in the field which it discusses, and in the hope that it will lead to further discussion among members of the Congress and others.

INTRODUCTION

Various phases of our economy have become so complex and intricate that government regulation must be exercised through special agencies possessing experience, expertness and concentration.

In creating an administrative agency, the legislature premises a divided responsibility:

First, that the agency has an autonomous responsibility for making decisions within the policy standards and procedural machinery fixed by the statute, subject to judicial review to assure fidelity to the statutory requirements.

Second, that the legislature retains responsibility for amending the statute if need is revealed for a change of the standards or methods of procedure.

In order properly to discharge its responsibility, the legislature must closely observe and analyze the functioning of the agency. This function of the legislature has come to be known as legislative "oversight," the term by which the function is referred to in the Legislative Reorganization Act of 1946. This report proceeds on the assumption, first, that alert legislative oversight is an integral part of the system of regulation by administrative agencies, and, second, that there must not be intimidation of the agency or

encroachment upon its distinctive duties and sphere of responsibility.

Legislative oversight by the Congress, with which this analysis will be solely concerned, is usually exercised through the various standing committees of each house of Congress.[1] For example, within the orbit of the Interstate Commerce Committee of the United States Senate fall the Securities and Exchange Commission, the Interstate Commerce Commission, the Federal Trade Commission, as well as other agencies.

This oversight function has recently come to sharper focus in the creation, with respect to both administrative and executive agencies, of so-called "watchdog committees" in statutes passed by the 79th and 80th Congresses, dealing with management-labor relations, atomic energy control, and European aid. Many problems of unusual novelty and difficulty were presented in these fields and it was thought they required special attention by specifically designated joint committees. Such a committee may tend to function more actively and effectively than a regular standing committee because of the explicit statutory assignment of duties; because its membership is not subject to the rules of seniority and therefore can profit from the enthusiasm and vigor of new members; and because it is a joint committee of both houses of Congress. There is obvious need for particular watchfulness where legislation is frankly experimental and the issues are highly charged with emotion and public anxiety. These objective merits of the watchdog committee are not diminished by any motive the 80th Congress may have had to hold tight reins upon the administrative activities of an antipathetic administration. The watchdog committee is a resourceful device which places within a statute its own instrument for facilitating amendment in dynamic and controversial sectors of our economy.[2]

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[1] We have in this report excluded analysis of state agencies and of the relations of Federal agencies with the executive.

[2] In the Senate debates on the Taft-Hartley bill, Senator Ives said:

> "Finally, and most important of all, is the question of the Joint Congressional Committee which has been referred to in the discussion

Administrative agencies having assumed large significance in our system of law, we believe it important that attention be now specifically directed to the appropriate relations between them and the legislature. Time was when administrative agencies had to struggle for their right to exercise the independent responsibility delegated to them. During that period, particular restraint in the exercise of legislative oversight might have been proper, since the uncertainty of the agency's own status suggested a corresponding disposition to yield to slight legislative pressure. Agency status is now sufficiently well-established, however, that a more vigorous exercise of the oversight function would appear to be both safe and proper, provided, of course, that both Congress and the agencies proceed with understanding and respect for the proper spheres of each. Closer liaison will enhance the effectiveness of Government.

The problems of interrelationship are twofold:

(I) THE APPROPRIATE SUBJECT-MATTER OF THE RELATIONSHIP
(II) THE MEANS OF SUCH INTERRELATION

I. *Appropriate Subject-Matter*

We shall deal first with the proper scope of legislative attention and comment. In doing so, we have kept constantly in mind that while the legislature has a continuous obligation to study and assess the operations of an agency, the legislature's essential duty is to establish an act and the agency's essential duty is to administer the act; and that, generally, the lines between these respective responsibilities should not be crossed from either side.

The problem is a delicate one and is not susceptible of rigid control or rule-making. In the last analysis, only a disciplined attitude of discernment and self-restraint can yield assurance that

today. Too little attention has been paid to the importance of that joint committee. However, I think its significance is now beginning to be realized. The Joint Committee itself, through its own operations and activities, can pave the way for the removal of any undesirable situation which may develop as a result of this legislation. . . ."

the legislator and administrator will each execute his own proper function and scrupulously respect the other's. In this section we have undertaken no more, therefore, than to propose certain cautions and canons of propriety.

We take it to be established principle that the legislature's task is confined to (1) establishing policy standards, (2) prescribing the structure and procedure of the agency, and (3) appropriating the necessary funds. It then becomes the agency's responsibility to administer the statute within the policy standards as set forth by the legislature, through the methods of procedure established by the legislature, with such funds as the legislature has allotted. In thus administering the act, the agency is to be free of legislative interference. Thus we find that legislative oversight of the agency should be essentially directed to the need for altering standards, structure and procedure, or budget through legislation. There are limited exceptions which will be hereafter indicated.

The statutory formulation of the purposes of "legislative oversight by standing committees" of Congress is to be found in Section 136 of the Legislative Reorganization Act of 1946 (LaFollette-Monroney Act):

> "To assist the Congress in appraising the administration of the laws and in developing such amendments or related legislation as it may deem necessary, each standing committee of the Senate and the House of Representatives shall exercise continuous watchfulness of the execution by the administrative agencies concerned of any laws, the subject matter of which is within the jurisdiction of such committee; and for that purpose, shall study all pertinent reports and data submitted to the Congress by the agencies in the executive branch of the Government."

The introductory statement of the Joint Committee on Labor-Management Relations in its report of March 15, 1948 professes recognition by the Taft-Hartley watchdog committee of a similar function and its limits:

"The joint committee has been frequently referred to as a 'watchdog' committee to observe the effect of the law in operation. It should be made clear the Committee has not sought to interfere with the independence or judgment of any agency or Department charged with its enforcement or interpretation. Rather, we have conceived our function to be one of keeping in daily contact with administrative developments in order to be in a position to call to the attention of Congress any defects which might develop in the law itself or in its administration, requiring remedial action. . . ." [3]

In considering the proper subject matter of oversight, we find that our analysis necessarily deals with caveats relating to:

(A) Pending cases
(B) Decided cases
(C) Procedure and internal organization
(D) Substantive rules

A. PENDING CASES

The basic principle of non-interference with the agency's own essential responsibility has its most obvious application with respect to proceedings actually pending before the agency.

It is clear that legislative committees ought not suggest how the agency should decide particular cases or issues pending in those cases—any more than the legislature would presume to suggest to a court that it should decide a particular case for the plaintiff or defendant. We have found, however, that this precept is not universally respected in practice. Indeed, departures are to

[3] We have singled out the Taft-Hartley watchdog committee as a special object of our study for illustrative purposes. The statement we have quoted indicates a more contained function for this watchdog committee than the sweeping one which appears to have been originally contemplated by Senator Ives who said in the course of the Senate debate: "The joint committee should act in part to *help formulate administrative policy and procedure* as well as to perform its functions as a strictly legislative agency at the inception of the new law." (emphasis ours)

be found in both the majority and minority reports of the Committee on Labor-Management Relations. The majority of the Committee noted that the issue of the legality of certain closed-shop demands by the International Typographical Union was pending before the National Labor Relations Board in several cases arising under the Taft-Hartley Act. The majority itself undertook to characterize those demands as unlawful under the Act (Report of March 15, 1948, pp. 26, 27). The minority, which criticized the majority for this departure from its own "salutary rule" of non-interference, was itself derelict, however, in stating its views on issues in pending cases involving the extent of the ban on union coercion of employees. The minority, mentioning specific cases, noted its disagreement with the view of the General Counsel that the provision prohibited more than violent and coercive conduct on the picket line, although that issue was yet to be decided by the Board itself. (80th Cong., 2d Sess., Report No. 986, Part 2, pp. 19–20)[4]

Non-intervention in pending cases includes hands off the manner in which a particular case is being processed, as well as the way in which it should ultimately be decided. It would mean, for example, that the legislative committee ought not to suggest that a particular case be given priority over others. Yet an instance of just such a suggestion is to be found in the majority report of the Taft-Hartley watchdog committee, which makes the comment

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[4] These expressions in both reports seem to justify the fears of Senator Morse, who said in April, 1948:

> "One thing you want to be very careful about is a new trend in legislation developing in Congress. . . . to pass a law affecting a quasi-judicial tribunal, and then set up a legislative watchdog committee over the law.
>
> "Now, my position . . . is that we must not let the legislative body of our Government interfere with the judicial process of our Government. . . .
>
> "I do not say that this committee has or will interfere with the judicial processes of the National Labor Relations Board, but I say there is a possible danger of it, because the law is not sufficiently specific on that point. . . ." (Proceedings of New York University First Annual Conference on Labor, 1948, New York, p. 611)

on a particular case then pending before a trial examiner that "its national importance should guarantee that he give its determination precedence over all other duties occupying his time" (Majority Report, March 15, 1948, p. 9).

B. DECIDED CASES

The same constraints apply to comment on cases already decided by the agency where such comment is intended in any way to influence the agency to reverse its previous ruling or, as would more likely be the case, to limit the trend indicated by that ruling. Criticism of decided cases designed to influence future agency action under the existing statute, with respect to some doctrine the agency is evolving, intrudes upon the agency's area of responsibility in the same way as suggestions on how to decide pending cases.

If, however, the committee is genuinely considering changing the terms of the statute, the committee's discussion of such proposed (or considered) changes may unavoidably involve criticism of agency decisions. Where there is this proper legislative objective of a general and constructive nature, such collateral criticism of decided cases is not objectionable. Since the committee's chief business is to deliberate upon desirable modifications of the statute, the committee will sometimes find it necessary to analyze agency decisions and present an appraisal of them incidental to recommending legislation.

The appropriate test would appear to be: Is the criticism genuinely a phase of the committee's consideration of a legislative reorientation?[8]

C. PROCEDURE AND INTERNAL ORGANIZATION

Factors of a different character allow the committee greater latitude, however, in matters pertaining to the agency's proce-

[8] Indeed, the same criterion might, in extraordinary instances, justify reference even to a pending case where such reference is integral to a bona fide contemplation of statutory change of a general policy nature and is not intended to exert pressure

dures and internal organization. In the larger statutory setting of the agency's structure, many of the agency's procedures may be matters of relative detail which are left to the agency to establish. Further legislation will often be an inappropriate means for solving procedural problems, especially where attempts at solution may have to be experimental. It is not practicable to process through a busy Congress a statute which does no more than change a procedural regulation or revise an agency's internal organization in some particular. For example, the suggestion in the report of the Joint Committee on Labor-Management Relations that the Board's chief trial examiner should devote his time primarily to hearing cases, rather than to supervisory duties, is not the kind of suggestion that could sensibly rise to the dignity of legislative amendment.[6]

Standing committees, whose oversight often extends to several agencies, and whose experience thus provides standards of comparison, may sometimes be in a better position to assess the mechanics of a particular agency's operations than the agency itself, whose experience, though more intensive, may be less broad. To require that suggestions of a procedural character be embodied only in recommended legislation would in practice mean that the suggestions could not be made effective at all. It would therefore seem appropriate for the committee to make suggestions to the agency with respect to its procedures or internal organization without regard to proposals for statutory change.

D. SUBSTANTIVE RULES

Further deviation from a strict division of responsibilities may be approved in connection with promulgation by the agency of

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on the agency to decide one way or the other. Traditional repugnance to special legislation would suggest, however, that recommendations for statutory change should not be designed to secure a particular result in a particular case in aid of a special interest or litigant, but should be addressed to questions of basic policy which may be dramatized by a pending case of great moment.

[6] We do not mean to express any opinion as to the merits of the Committee's suggestion.

proposed substantive regulations. The Securities and Exchange Commission, for example, will announce proposed regulations within areas as to which discretion has been granted to the agency by the statute. A proposed stabilizing regulation would be an instance. The Commission invites comments from all sources before making its regulation final and binding. The standing committee is often in a position to comment helpfully upon the proposal. It seems clear to us that since the agency desires the views of the committee, and perhaps also those of its individual members, the committee and its members should feel entirely free to voice their views. Their comments should not, of course, operate as a mandate to the agency. Congress having delegated to the agency the power to regulate, the agency must, in the last analysis, have a free hand to exercise its own informed judgment.

II. *Means of Interrelation*

An adequate functional study of our problem requires also a consideration of the means of interrelationship between Congress and agencies. These means have been:

(A) Reports by the agency to Congress
(B) Formal investigative hearings by Congressional committees
(C) Reports by Congressional committees
(D) Informal contacts between the agency and Congressional committees
(E) Informal contacts between the agency and individual members of Congress

A. AGENCY REPORTS

Traditionally, and sometimes pursuant to statutory requirement, administrative agencies send periodic reports to Congress. These reports provide Congress and the public with highly valuable basic information as to how the agency is regulating its assigned field and the expenditures incurred in the process.

Busy members of Congress cannot be expected to follow closely

all the agency opinions, or the orders and regulations faithfully reported in the Code of Federal Regulations and the Federal Register. Thus the periodic reports fill a real need. Quite naturally, such reports will, in all good faith, seek to persuade Congress that the agency has carried on its work efficiently and diligently. The reports may thus be viewed in part as special pleadings designed to convince Congress that the agency's powers and appropriation should be maintained or increased. Obviously, therefore, Congress also requires sources of information in addition to such reports.

Besides their periodic reports, agencies frequently make special reports of major significance. Such special reports are made on the agency's own initiative or at the request of Congress or one of its committees. Such reports may (1) relate to the functioning of the agency itself in particular areas or (2) explore an area of prospective regulation or (3) survey the functioning of a segment of industry. Typical of such special reports are respectively the reports by the Federal Power Commission on its first five years of administration of the Natural Gas Act; reports by the Federal Communications Commission on the telephone industry and on proposed telegraph company mergers; and reports by the securities and Exchange Commission with respect to various aspects of security trading and regulation.

B. FORMAL INVESTIGATIVE HEARINGS BY CONGRESSIONAL COMMITTEES

Occasion arises for Congressional inquiry for the purpose of gathering information not to be found in agency reports. Such inquiry is usually made through investigatory hearings. Such hearings with respect to a particular administrative agency may be held (1) by the committee on appropriations of either house, (2) by the standing committee within whose jurisdiction the subject-matter of the agency's activity falls, (3) by a watchdog committee, or (4) by other special committees. The appropriations committees, which determine the propriety of the budget, must

have wide powers of inquiry. Each standing committee, as heretofore noted, is charged by the Legislative Reorganization Act with watchfulness over the administration of statutes by agencies within the jurisdiction of that committee. The special committee may be a watchdog committee (to which the task of surveillance is entrusted by the agency's basic statute), or it may be a committee to which investigation of a particular agency has for some reason been specifically assigned by resolution of the House or the Senate. We shall consider separately each of these types of committee investigation.

1. *Appropriations Committees*

The proper function of appropriations committees is to determine the cash requirements of an agency. Accordingly they should ordinarily not concern themselves with whether past decisions or regulations accord with the view of the committee members as to the "legislative intent." Their concern should rather be with whether:

(a) The agency's administration of its affairs has been economical or wasteful;

(b) The amount of the appropriation sought by the agency is excessive or inadequate, in view of its work load and other demands upon the over-all budget.

In forming a judgment on these matters, an appropriations committee ought to seek the views of the standing committee or watchdog committee which has a special familiarity with the particular agency. In that way the appropriations committee can achieve a greater awareness of the regulatory problems confronting the agency.

Appropriations bills occasionally stipulate that not more or not less than a specified part of the agency's total appropriation shall be spent by the agency on a particular part of its work. Before recommending such limitations on the spending power of the agency within its overall budget, it is desirable that the appropri-

ations committee consult with the standing or watchdog committee having jurisdiction of the agency involved. The appropriations committee should also exercise restraint commensurate with its own lack of special knowledge of the field in which the agency is expert.

2. *Standing Committees*

As we have noted, in each house of Congress a standing committee, given jurisdiction of the subject-matter of an agency's activities, exercises "continuous watchfulness" over that agency's execution of its duties. Such watchfulness, when exercised through formal hearings, has been most frequent in connection with either appointments or proposed legislation.

The Senate's function in the confirmation of nominations by the President is executive rather than legislative in character, and this fact indicates greater latitude in the conduct of confirmation hearings and special considerations of propriety. We have suggested, for example, that a Congress dissatisfied with agency interpretation of the governing statute should amend the statute, not coerce the agency to change its view. In the confirmation of any appointment, however, the Senate may legitimately feel that the nominee's record indicates a disposition to depart from the legislative policy in ways for which amending legislation provides no satisfactory redress. Experience may show the nominee to be so confirmed in his habits of thought that amendments do not prevent him from consistently whittling away at or expanding upon the legislative policy whenever a plausible occasion presents itself to him. Such considerations, we think, are proper subjects for Senatorial inquiry.

At the same time, every effort should be made to insure that confirmation hearings are not made the occasion for bringing pressure to bear on an agency in a policy area. Hearings upon appointments (and particularly where the appointee is being reappointed) have sometimes been the occasion for exhaustive and bitter exploration of an agency's past decisions or regulations.

Decisions or regulations dealing with genuinely arguable questions of fact, statutory interpretation or policy, and the expression of minority views should not be influenced by the threat of Senatorial reprisal. On the other hand, obstinate dissents or over-frequent reversals by reviewing courts may reflect upon the official's competence or usefulness. But, in general, if the Senate, with the concurrence of the House, should conclude that the agency's determinations run counter to what Congress believes is sound policy, the better remedy lies in amendment of the statute itself.

Another occasion for hearings before standing committees arises in connection with proposed legislation, whether originating with the committee or otherwise. Consideration of such legislation will frequently warrant public hearings at which the past decisions, regulations, or procedures of the agency are a proper subject of inquiry. In such cases, the views of the agency (which may even exhibit a conflict between agency members, as in the case of the Federal Power Commission's comments on the Moore-Rizley Bill in 1948) are normally important in the formulation of intelligent legislative action. The pendency of a case before the agency may, however, warrant restraint on the part of agency members in the expression of their views before Congressional committees.

3. *Watchdog Committees*

As more fully discussed elsewhere in this report, the watchdog committee appears to us to be of value in certain unusually difficult or novel fields. It is too early to judge the wider usefulness of this recent device, which largely displaces the relevant standing committee.

4. *Other Special Committees*

Formal investigations of administrative agencies, unrelated to specific proposed legislation, are sometimes conducted by committees appointed especially for that purpose by one or both houses of Congress. These extraordinary investigations have as

their immediate subject the policies, administration or personnel of the agency. Such investigations can be valid sources of information. Unfortunately, however, they may serve as vehicles of intimidation or political purpose. Examples of such investigations are those of the Smith Committee, appointed by the House in 1939 to investigate the National Labor Relations Board, and of the Cox Committee, appointed in 1942, and the Harness Committee, appointed in 1948, to investigate the Federal Communications Commission. We believe that little of value is accomplished by the klieg-light type of investigation too often resulting from the appointment of a special investigating committee, which only impedes the agency in the discharge of its responsibilities. The publicity aspects of extraordinary investigations offer temptations which can only be deprecated. The normal channels are usually sufficient to accomplish the legitimate purposes of oversight and can do so with far less distraction and waste.

C. COMMITTEE REPORTS

Many committees charged with "oversight" duties render formal reports containing their findings and suggestions. The Legislative Reorganization Act of 1946 makes no specific requirement for the rendition of such reports by standing committees. However, the Taft-Hartley Act required the watchdog committee established by that Act to render reports at specified times, and the watchdog committee created under the Atomic Energy Act is required to report "from time to time." While these reports are formally addressed to Houses of Congress, they can and sometimes do contain material which can be helpful to the agency. No objection can be taken so long as such reports evaluate agency operation in terms of the need or lack of need for amending legislation. To the extent that the reports contain suggestions to the agency as to changes in current administration of the existing law, such suggestions should be confined to matters which do not lend themselves to correction by legislation (e.g., the agency's internal procedures), and in such cases should care

be taken that the suggestions cannot be construed as demands. In fact, to confine suggestions to formal committee reports is an effective device to avoid suspicion of inadequate deliberation or dubious motive on the part of the committee or its members.

D. INFORMAL CONTACTS WITH CONGRESSIONAL COMMITTEES

There are informal means by which the appropriate Congressional committee may supplement the information which comes to it in formal reports or hearings. Through such informal means the committee can more adequately perform the watchful function contemplated by the Legislative Reorganization Act. Such means include meetings between one or more of the agency's commissioners on the one hand, and the full committee or a subcommittee on the other. Such meetings may be periodic or sporadic. There may also be conferences between a member of a committee or one of its staff and members of the commission or its staff. An interesting recent example was a conference between a member of the Federal Communications Commission and staff experts with members of the House Interstate and Foreign Commerce Committee to discuss problems arising from recent disclosures of wire-tapping in New York City.

There appears to be no general practice of holding regular meetings between a Congressional committee and the members or representatives of an administrative agency. A list of committee meetings of the Senate Committee on Interstate and Foreign Commerce for the Eightieth Congress, appearing in that committee's Legislative Calendar, shows that, up to the time when the Second Session reconvened in July of 1948, meetings were had with only two agencies. Meetings with members of the Civil Aeronautics Board were held on two occasions early in January, 1947. The Legislative Calendar divulges only that they were "in reference to aviation matters." Further discussion of aviation problems was held at later sessions of the Subcommittee on Aviation, but it does not appear that representatives of the Civil Aeronautics Board were present at those sessions. In March of 1947 the

full committee held an executive session with four members of the Maritime Commission "to discuss general maritime matters." This record, if it is typical, indicates relatively little use of the conference technique for oversight of an agency's activities—at least on the committee-commission level. In this connection, we understand that the present Chairman of the Federal Communications Commission has made particular efforts to work out a system for the periodic review by the appropriate Congressional committees of the Commission's problems and objectives, but that he has apparently not succeeded in obtaining such review. This is perhaps not surprising in view of the number and importance of the agencies whose work falls within the purview of the House or Senate Committees on Interstate and Foreign Commerce. The demands upon the time of the members of those committees may well be such that a succession of periodic meetings with top agency members would be both impracticable and unprofitable. The full committee may therefore deem it advisable to designate certain of its members as a subcommittee to devote attention to the problems of a single agency. Thus, on June 19, 1948 the Senate Committee on Interstate and Foreign Commerce appointed a "Subcommittee to Study Communications." The establishment of too many subcommittees might possibly, however, defeat the objective of the Legislative Reorganization Act of 1946, by which it was sought to simplify the committee structure of Congress. The practical difficulties may be alleviated through the increased use of staff personnel possessing special qualifications to consider the problems of particular agencies.

E. INFORMAL CONTACTS WITH INDIVIDUAL MEMBERS OF CONGRESS

The extent to which individual members of Congress concern themselves informally with the functioning of a particular agency (as to whose operations that member has no committee obligations) appears to be determined primarily by the degree to which the agency is blazing a new trail and its regulation has not yet become canalized. Thus the spasmodic interest of a member

of Congress today is far more likely to be directed to the Federal Communications Commission or the National Labor Relations Board than to the Securities and Exchange Commission or the Interstate Commerce Commission.

Where regulation in a given area is still in its infancy, it is to be expected that the constituent whose interests are affected by this new "impediment" is more likely to call upon his Congressman in Washington to accomplish one or more of the following purposes, listed in the order of increasing impropriety: (a) to obtain for him information (which he could almost invariably obtain directly from the agency), (b) to seek to obtain some expedition in the agency's handling of the matter before it, or (c) to seek to affect the decision of the agency, either in a specific controversy or in the agency's promulgation of general regulations. The limitations which a member of Congress should impose upon his own action in connection with requests of this sort are clear from our earlier discussion. Where the Congressman feels that, as a practical matter, he must show evidence of serving his constituent by making a properly delimited request, there is much to be said for the setting forth of the Congressman's requests in written form, so that they can be dealt with frankly and openly, and without embarrassment by the agency involved.

The task force report on regulatory commissions (which was prepared in January 1949 for the Hoover Commission on Reorganization of the Executive Branch of the Government) suggests that the duty of watchfulness, which is entrusted to standing committees, also provides a means for using constructively the inquiries and complaints sent to individual members of Congress. "If the members adopted the practice of referring all such complaints and inquiries regarding a commission to the appropriate standing committee charged with its oversight, the committee could use them for investigation. The volume and character of such material would be a rough index of the performance and weaknesses of the commission. At the same time, this method would shield both the Congressman and the com-

mission from the suspicion of influence inherent in direct approaches for constituents."

We concur in this suggestion, recognizing, however, that many inquiries of members of Congress on behalf of their constituents which are genuinely directed merely to the obtaining of information or other routine matters will naturally be directed to the agency itself.

* * *

We believe that further experience will make it possible for legislators and administrators to recognize more readily the essential division of their respective responsibilities. The independent administrator, free to accept or reject suggestions from any quarter, will welcome advice or criticism from the enlightened legislator. The latter will offer his views as suggestions to be considered, not demands to be satisfied. He will himself in turn seek further light from the administrator. A mutually helpful exchange of information and ideas will exist, when legislators will not seek to intrude their views upon agencies and administrators can feel secure enough to give only such weight to legislative comments as they appear to him to deserve on their merits.

Meanwhile our analysis of the problem suggests the advisability of erecting certain self-imposed boundaries such as those indicated in this report. Vigilant and conscientious exercise of proper oversight and consultation are much to be desired and encouraged. The means which exist are adequate to improve the efficiency and responsibility of administrative operations.

The relation between the legislature and the agencies is an instance of a recurrent problem of democratic government: the suitable accommodation of popular control and flexible administrative expertness. The issues of judicial review have occupied public attention to such an extent that this problem has been left largely unexplored. We hope that the modest start made in this report will stimulate further thought and suggestions. The subject is one which concerns every practicing lawyer, as well as legislators and administrators, and is basic to the understanding

and improvement of the workings of our democratic institutions of government.

Respectfully submitted,

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A Reappraisal of Collective Bargaining in the Light of the Presidential Steel Board Report and Dictum

By Lyman M. Tondel, Jr.

Introduction

The 1949 Presidential Steel Board Report[1] was eighty pages long and based on somewhat over sixteen days of hearings between July 28th and August 29th, 1949. It was a good report—well considered, carefully and impartially prepared. Few would agree with the Report in all respects. After all, the questions involved were controversial and the limits of the Board's wise exercise of power were themselves disputed. But it is a credit to Judge Rosenman and Messrs. Cole and Daugherty, as is perhaps best evidenced by the extent to which both labor and management have criticized it.

The Report itself solved nothing, however. It was a good and possibly helpful try under difficult circumstances. In some respects, its most significant language was the dictum at the end of Part III in which the Board noted the extent to which we have departed from "the original conception of collective bargaining on a plant-by-plant basis" [2] under the Wagner Act. In a sense, the

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Editor's Note: Mr. Tondel, First Vice Chairman of the Section of International and Comparative Law of the American Bar Association and member of The Association of the Bar, is lecturing on Labor Legislation at New York University School of Law. He is the author of articles on corporate and railroad reorganization and of *The First Twelve Years of The Junior Bar Conference*, 20 Conn. L. Rev. 221 (1946). Mr. Tondel is a former National Chairman of the Junior Bar Conference of the American Bar Association. This article is an adaptation of a lecture delivered by Mr. Tondel on November 3, 1949, before the Section on Labor Law of the Committee on Post-Admission Legal Education at the House of the Association.

[1] *In re Basic Steel Industry and United Steelworkers of America (CIO)*, September 10, 1949, reported in 13 LA 46 (hereinafter cited as "Steel Report"). Fact-Finding Board: Carroll R. Daugherty, Chairman; David L. Cole; and Samuel I. Rosenman.

[2] Steel Report, p. 64.

Board was there complaining of the incompatibility with the industry-wide bargaining before it "of the provisions of the Labor-Management Act on collective bargaining and the common understanding of the subject." [2] In a sense, the Board was there justifying the President's appointment of it outside the law. In fact, it was going out of its way to call for a reappraisal by Congress of collective bargaining so that such ponderous industry-wide impasses might be avoided in the future.

If there appears to be overemphasis on this dictum, be it noted that this was the portion of the Report most vigorously criticized by Radio Moscow.[3] Could it be that industry-wide bargaining is part of The Party line? Or that one of the moves that would most hurt The Party's effort to seize the labor movement would be restrictions on the size of the collective bargaining unit?

Be that as it may, thoughts engendered by this dictum of the Board will be stressed in this discussion, but first the underlying facts and the Report itself must be summarized.

BACKGROUND FACTS

The Wagner Act Was Enacted to Further Collective Bargaining in Units of Limited Size

So short is human memory that we already are prone to forget that as recently as 1935 the Wagner Act's primary purpose was to insure labor's basic rights to organize and to bargain collectively—rights not previously guaranteed by Federal Statute in this country. We are prone to forget that the admitted policy of Congress at that time was to lift employees' representatives to an equal plane with their employer at the table of collective bargaining. We had just passed through a depression when unemployment reached a peak, when jobs were at a premium, and when labor was so cheap that those who sought strength through collective bargaining risked their jobs and often more. In the

[2] Steel Report, p. 64.
[3] Daily Labor Report, October 13, 1949, p. 10.

words of the late Senator Walsh, as quoted in the Steel Report, all the Wagner Act proposed was to escort the employees' chosen representatives "to the door of the employer and say, 'Here they are, the legal representatives of your employees.'" [4] The bargaining unit was assumed to be no larger than a single company, and usually no larger than a plant.

Since 1935 Prosperity Has Nourished Gigantic Bargaining Units

We also forget that, with a brief interval in 1938, the years from 1935 to 1949 were years of constantly greater wealth in America, years of diminished if not minimum unemployment, years when labor was scarce and jobs were not. These were years during which, except when the war Government imposed stability, wages and other benefits could, and did, rise frequently in most industries. Dues mounted in volume and many unions became big business. As their power increased, their appetites followed—a human trait—and what had started as usually plant-by-plant bargaining became, in the short space of 13 years, industry or company or area-wide bargaining in many important fields.

To employers this also afforded some tempting attractions. It is, for example, easier to negotiate and administer one master contract with one big national union than 47 plant contracts with 17 different unions. But these attractions may have been deceiving.

The Recent Growth of the United Steelworkers of America

Back in 1935, lest we forget, there was no United Steelworkers of America. The next year, however, the youthful CIO formed the Steel Workers' Organizing Committee and on March 2, 1937, it signed a contract with United States Steel. Within four weeks, 41 other steel producers recognized the Union. In 1942, the "Little Steel" companies signed up; the organizing job was over; and the United Steelworkers of America was created as an international union. It now includes over 2,000 locals with about

[4] Steel Report, p. 63.

1,000,000 members and has about 1,900 collective-bargaining contracts with some 1,600 companies. Some of these companies are not in the steel industry or any phase of it. That is an important fact.

During the war, as already indicated, free collective bargaining was virtually suspended, and in 1946 (after a strike), 1947 and 1948 there came the industry and union-wide contracts containing the so-called first, second and third-round wage increases of 18–½ cents per hour, 15 cents per hour and 13 cents per hour, respectively. Annual wage increases were thus a regular feature for three years—not, forever, as some speakers and writers in 1949 would have led their audiences to believe. Incidentally, but of major interest, by 1948 most of the principal so-called fringe benefits, other than company-paid-for pension plans and welfare insurance, had become quite general—six or so paid holidays, one to three weeks of vacation with pay, call-in pay and the like.

In the 1946 strike, as apparently again in 1949, at least at the outset, the United Steelworkers of America took the view that the bargaining was on a nation-wide basis by the Union as a whole against all companies with which it had contracts. Accordingly, there was a strike by substantially all of its Locals regardless of the local conditions of the community, union or company, and regardless of whether a given Local had any connection with the steel industry.

The Events of 1949

The events of 1949 need only be sketched—the business setbacks and reduced profits of the first half of the year and the declining cost of living which together destroyed the principal arguments used by unions for regular wage advances; the resulting emphasis on demands for company-paid-for pension plans and welfare insurance in the bargaining in June and July, which was primarily between the Steelworkers' Union and United States Steel Corporation and the other large producers; the maneuvers of John L. Lewis; the President's telegram appointing the Steel

Board[6] and the parties' acceptance—prompt and unconditional in the case of the Union, reluctant and conditional on the part of the companies; the Steel Report of September 10th recommending no wage increase but welfare insurance and pension funds costing the companies 4 cents and 6 cents per man hour, respectively; the breakdown of bargaining over the non-contributory feature; the strike; and the CIO Convention that began on Monday, October 31st, and brought to a temporary peak the political disputes within the CIO. Some of the smaller steel companies settled on the Board's terms but, speaking generally, the industry refused to accept the non-contributory feature. Until the pattern-making Bethlehem Steel settlement on October 31st (a coincidence?) based on a non-contributory pension plan and a contributory welfare insurance plan, there was no real break in the strike.

On the other hand, the Steelworkers' Union began by following the tactics of 1946—pulling out its locals in other industries regardless of the wishes of the local unions, regardless of local conditions, and regardless of the status of bargaining locally. For example, at one plant in another industry, but with a Steelworkers' Local, the bargaining committee and the plant had agreed on terms, the committee expressed its desire not to strike, the Nathan Report (prepared for the Union) had distinguished this industry's position from that of steel—and yet the Local was ordered to strike; and strike it did upon the expiration of its contract in October. Alcoa's plants in eight states that are represented by the Steelworkers were similarly called out because of the uniform demand by the Union that all 1,000,000 members be covered by similar new contracts. There is evidence that the Steelworkers' Union began to fear the effect on public opinion of pulling out workers in unrelated industries just because they had Locals of the United Steelworkers of America, but enough such Locals struck to bring home the power of the Union of a million men in many industries when it bargains for all at once.

[6] Steel Report, p. 59.

Meanwhile, what happened to the public? Steel output was reduced to about 10%. Most fabricators were shut down either by their Locals of the Steelworkers' Union or for want of their main raw material—steel. The fabricators' closing caused manufacturers dependent on fabricated steel to close as their inventories became exhausted. This included manufacturers of automobiles, farm machinery, industrial machinery, railroad equipment, household appliances and other steel products, large and small. Many construction projects (including large housing projects as well as public building and industrial expansion) were stopped; the military building program was threatened or interrupted; and car loadings automatically fell as business receded. Aptly termed a "creeping paralysis," this phenomenon caused tens of millions of dollars of lost profits.

But that was one of the lesser consequences. Such paralysis did not seize one individual or an abstract nation. It seized on the men and women of America, their families and their savings; and, incidentally, it depleted unemployment insurance funds and reduced tax reserves. Retailers and wholesalers were, of course, affected seriously—even critically in some localities. If it had not been caused by a strike, this paralysis would have been known as a recession or depression. Because it was caused by a strike for higher costs, it could scarcely have been called a correction of the inflationary trend!

Nor did its effects stop at our borders. Apart from the glow of satisfaction it engendered in the hearts of our international political competitors, it improved their competitive position economically; it made men wonder whether "free enterprise" really works; and it slowed the flow of goods under the Marshall Plan and its counterparts. If there is a race for power in the world today, its periodic repetition on a national scale subjects the United States to the handicap of having to sit down for 40 yards out of every 440. That could, in time, have ruined even Paavo Nurmi. It is well that we, like Nurmi, run in distance races.

If only the Steelworkers had been on strike it would have been

bad enough. But, in addition, 380,000 members of the United Mine Workers were on strike at the same time; the International Union of Mine, Mill and Smelter Workers was threatening to strike at least a large segment of the non-ferrous metal industry, with all the implications that would have for manufacturers in the fields of electrical and communication equipment, batteries, gasoline, paints, etc., etc., etc.; and Hawaii was but recently free of a half-year strike embargo.

With this broad sketch before us—designed to put the situation in some perspective—let us turn to a quick summary of the Steel Report and then to some consideration of the significance of the dictum mentioned at the outset.

SUMMARY OF THE STEEL REPORT

There were three principal problems before the Board, namely:

1. *What, if anything, should the Board recommend about (a) the practice of industry-wide bargaining in steel "which seems to have stifled the process of collective bargaining" and (b) the charge that the appointment of the Board was itself a blow to collective bargaining?*[6]

As to the latter, the Board said that in the rare cases of major importance where all other efforts to reach an agreement have failed, the appointment of Fact-Finding Boards is as effective as any machinery yet suggested. Such Boards, with power to recommend, may promote and supplement collective bargaining. It said, in effect, that if it concluded otherwise it would have to abdicate. As to the growing practice of industry-wide bargaining, it made critical remarks to which we shall return.

2. *Should a general wage-rate increase be granted?*[7]

The Board answered "no" unexpectedly and with firmness. It preceded its discussion by asserting the obvious fact, too often

[6] Steel Report, pp. 61–64.
[7] Steel Report, pp. 64–83.

concealed, that the propriety of wage rates cannot be ascertained by mathematical formulae. This should be kept in mind. The Board admitted that the best it could do was to strive for the fairest settlement possible without doing violence to the delicate relationship among wage rates, prices and profits.

The Board then used average hourly earnings (total wage payments divided by the total number of hours worked during the given period) and comparisons of cents-per-hour increases (rather than percentages of increases) to arrive at the conclusion that steelworkers were not suffering inequity when their wages were compared with those of workers in other industries.

In a somewhat more complicated analysis, the Board then concluded that the steelworkers, over a period of years, had been treated fairly as compared with steel consumers, with stockholders in steel companies and with the steel companies themselves considered as separate units. The Board found that in the years 1941–48 the apparent growth in labor productivity for the economy as a whole (about 1–½% per annum compared with about 2% per annum from 1899 to 1939) was about the same as the rise percentagewise from 1941 to 1948 in the steelworkers' real average hourly earnings. The Board here made the interesting observation that if the "productivity gains in a particular industry are higher than for the economy as a whole," the "consumers at large should be the chief beneficiaries through lower prices" after "reasonable allowance for the needs of the industry for modernization and expansion in the public interest." If the gains were to go chiefly to labor, there would, it said, probably be serious distortions in the price structure.

The Board also found that the post-war profits of the steel companies did not justify wage increases. These pages of the Report are persuasive and well worth reading.

Finally, the Board concluded that the steelworkers' average hourly earnings had risen more rapidly than the cost of living and that no wage increase could be justified on the ground that they had suffered by comparison with other income-receiving groups.

Turning to the economy as a whole, the Board emphasized the need of the country for stable prices and an uninterrupted flow of production activity and concluded that a wage increase would impair the possibility of fulfilling this need. In a footnote of commanding interest, Chairman Daugherty rejected the notion that Lord Keynes favored raises in money wage rates during periods of depression; what Lord Keynes did recommend during such times, he said was a stable level of wage rates. From the "masters' views" —to quote Chairman Daugherty—with their emphasis on stability, he concluded in this footnote that the provision of "cash, medical and retirement benefits should increase the amount of certainty among households and stabilize their consumption spending." [8]

In its concluding paragraphs on the wage increase demand, the Board gave at least a nod to the Union when it said that if steel costs are reduced by modernization and expansion so that prices can be lowered but are not, then the Union might properly renew its demand for wage increases.

3. *How Should the Demands for Company-Financed Social Insurance and Pensions Be Treated?*[9]

The Board defined "social insurance" to include (a) group term life insurance; (b) paid-up life insurance given to a worker on retirement; (c) disability insurance to provide a weekly cash benefit for workers temporarily incapacitated by a non-occupational sickness or accident; (d) hospital insurance for workers "and, in some instances," their wives and children; and (e) surgical insurance for workers "and, in some instances, their wives and dependents."

The Board introduced this subject by pointing to these two factors:

(1) the employers' ability to pay; and

(2) "certain definite social obligations which are owed to workers in all industries."

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[8] Steel Report, p. 81.

[9] Steel Report, pp. 83–98.

Then it said:

> "*By a collective bargaining* which recognizes both of these considerations, we think that fair and equitable conclusions can be reached."[10]

Please note the words "By a collective bargaining."

As to the first factor, the Board noted inequity in the steel companies' not affording social insurance and pension systems for steelworkers, while affording "substantial pensions" for steel executives; it noted that other industries have such systems; and it concluded that the steel companies could afford a system of social insurance and pensions costing 4¢ per hour for the former and 6¢ per hour for the latter which, assuming a 2,000 hour work-year, would raise costs about 2–½%. At this point, the Board had obvious difficulty in reconciling this conclusion with its finding that the post-war profits of the steel companies did not justify a wage increase. But it at least tried to minimize its difficulty by putting greater emphasis on factor 2—the social obligation to the workers. Whether there is such a social obligation and, if so, its extent and the degree to which it has been satisfied; the effect of assuming such an obligation on this country's competitive position in world trade; and whether, if there is such a "social" obligation, it should be discharged by industry or by the State are major questions. Be that as it may, the Board concluded that *"in the absence of adequate Government programs"* (words again worthy of emphasis), all industry "owes an obligation to workers to provide for maintenance of the human body in the form of medical and similar benefits and full depreciation in the form of old-age retirement . . ."[11]

In arriving at its recommendations, the Board reviewed the existing social insurance and pension plans in the steel industry, which it found to be far behind other industries in this regard.

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[10] Steel Report, p. 82. Italics added in quotations throughout.
[11] Steel Report, p. 82.

This factor was undoubtedly an important reason for the ultimate recommendation. The Board also found, however, that where steel companies had such plans they were of the non-contributory type.[18] This also obviously impressed the Board. One factor elsewhere recognized by the Board—the "violent cyclical adjustments" in the history of steel—was not mentioned in this connection; and it will be interesting to see what future history shows as to whether, in the more volatile industries, a non-contributory plan involves more or less risk to the business and the plan itself than a contributory plan.

Since the steel impasse and the 1949 steel strike are said to have resulted not from the recommendation that the steel industry should provide social insurance and pension plans, nor from the opinion that the industry could afford a $4¢ + 6¢$ per hour charge, instead of the $6.27¢ + 11.23¢$ package demanded by the Union, but rather from the refusal of most steel companies to provide non-contributory plans, it is useful to hear just what the Board said on this score.

Speaking of social insurance, it said:[19]

> "The main impasse reached in whatever collective bargaining there was related to whether the social insurance plan to be adopted should be contributory or whether the employer should pay all. This is a subject which has occupied a great deal of the Board's attention. It is a matter upon which both sides have very decided views and present very cogent arguments. *Perhaps uniformity here will be impossible.* In the few existing plans in companies in basic steel there is no uniform pattern in this respect either. In the bargaining contracts which this union has made with other companies not in basic steel there is also no uniformity. *Decision will have to come by collective bargaining* which will take into account differences among the various companies.
>
> "We are recommending, however, that in general the sys-

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[18] Cf. *contra, Steel Formula—New Pattern in Pensions?* The Conference Board Management Record, Vol. XI, No. 10, p. 426. October, 1949.

[19] Steel Report, p. 89.

tem of insurance established by the parties should be non-contributory."

and further:[14]

"Of course, as a result of bargaining, it is possible that the parties may agree that the employer should pay the 4 cents to buy some of the items in the plan at the level requested by the union, and that the workers should pay 2 cents or some other amount to buy other items requested. In any event, as pointed out above, 4 cents will provide a substantial social insurance program. By genuine good-faith collective bargaining, the parties might agree on any combination of social insurance benefits along these lines."

In connection with pensions, the Board later said:[15]

"It seems to us that a similar study on pensions and retirement plans is even more necessary than was that on insurance. The subject is much more involved, the basic principles much less defined, and the commitments are much more serious in both time and money. An insurance program runs from year to year, but a pension plan approaches permanency. We believe that it would be highly inadvisable and unrealistic to bargain seriously over a pension plan without first having a thorough study jointly made. Intelligent and constructive bargaining over its terms and conditions would be materially enhanced by such a study. We believe such a study is the intelligent preliminary to working out a sound pension program. We realize that the employees are impatient and would like to avoid further delay but we know of no other reliable approach. To avoid undue delay we are recommending that the study be undertaken at once and pressed to a conclusion as promptly as possible. Since all parties agree that pensions will be bargainable at the time the present contracts expire in April, 1950, it is hoped that the study will be concluded at least 60 days before that time, in order to give the parties a full chance to bargain.

"A few guideposts are recommended. While the level of benefits may be changed by agreement of the parties from time to time, the basic features must be fixed at the outset.

[14] Steel Report, p. 91.
[15] Steel Report, pp. 97–98.

> For the reasons already mentioned, the plan should be non-contributory."

Was the Union or were the Companies right as to whether the social insurance and pension plans had to be non-contributory, in order to conform to the Board's Report? Was it or was it not a failure by the Union to bargain in good faith to demand at the outset the non-contributory feature in both plans as a condition precedent to bargaining? As is now well known, the pattern-making Bethlehem settlement was finally on the basis of a non-contributory pension plan (liberalizing a pre-existing plan) and a contributory social insurance program.

The Board also concluded that under the "reopening" language of the various unmatured contracts, pensions were not bargainable but that under the NLRA they were bargainable since there was nothing about them in the contracts. That part of the Report is of interest in other connections but it is only collateral to this study.

There are two final points to be made before returning to the dictum first mentioned above:

1. The Board was very careful throughout to recognize that it had no authority to do anything except make findings and *recommendations* as an aid to collective bargaining. The Board Members seem to have been thoroughly convinced of the importance of maintaining unimpaired the integrity of that democratic process so characteristic nowadays of the free enterprise system. May the Government be as conscientious in protecting it.

2. There were 38 principal appearances by steel companies, not including subsidiaries, and the Board repeatedly recognized that they were in widely varying circumstances which would have to be recognized in collective bargaining. For example, it recommended that the cost of their respective existing social insurance and pension plans, if any, be deducted from the 4¢ and 6¢ items. At every opportunity, the Board seemed to "plug" for collective bargaining on a unit basis—and that observation leads at last to the dictum that is to be emphasized.

THE STEEL BOARD DICTUM AND OBSERVATIONS THEREON

At the conclusion of Part III of its Report, the Board spoke as follows of the changed nature of collective bargaining and of the tendency even to abandon it in favor of Governmental fiat:

"For many years labor sought the right – as distinguished from the privilege – to bargain collectively. To gain this right it has had to engage in bitter strikes and to devote great energies and funds to educational processes. Piecemeal, its objective has finally become a reality, and for some 15 years has been guaranteed by law. In this dispute, however, it was the representatives of management, rather than of labor, who urged before the Board the importance of real collective bargaining and who asked that it be resumed.

"During the war collective bargaining was deliberately suspended. Labor gave its pledge not to strike and thereby lost its chief economic power to bargain effectively. In return President Roosevelt created the War Labor Board. Because of its tripartite membership, the War Labor Board served under the circumstances as a satisfactory substitute for collective bargaining. The exigencies of the war and the force of public opinion compelled the acceptance of its decisions in all but very few cases. All informed people, however, decried the suspension of collective bargaining at the time, and expressed the hope that it would be reestablished in full vigor as soon as the wartime emergency was ended.

"However, the hopes have not been fully realized. Perhaps the habit of turning to Government instead of arguing it out in collective bargaining has become too entrenched. Parties now seem to give up too early in the search for solution of differences around the table."

* * *

"Not only are Government bodies called upon to find solutions which the parties ought to find for themselves in direct negotiations, but the parties are more frequently content, either through their own choice or at the urging of public officials, to delegate to arbitrators the responsibility of determining what shall be the wage rates and other terms and conditions of their agreements. We have already referred to the boards of inquiry

under the Labor-Management Relations Act, and the general acquiescence in the proposal that their functions be enlarged to include recommendations.

"One may well wonder about these developments. Part of the explanation is perhaps that the collective bargaining pictured at the time of the Wagner Act was something different from that which is now used. The main purpose of the Act was to enable employees voluntarily to develop labor organizations which would be recognized and dealt with by management as the collective-bargaining agencies of the employees. The details of bargaining thereafter were to be left solely to the parties and were not to be a concern of Government."

* * *

"Since the Wagner Act was enacted, however, unions have become firmly entrenched, and the areas of their activity have changed. No longer do they deal simply with a single employer for such things as recognition, union security, and basic wage and working conditions. They now concern themselves with all sorts of conditions in which their members have an interest or stake, like insurance and retirement plans. They have also come to deal with groups of employers at the same time and, as in coal and railroads, with whole industries.

"In the steel industry an unusual type of bargaining was evolved. An agreement is first reached by the union with the United States Steel Corporation or with that corporation and a selected few of the other industry leaders, and is then accepted by all other managements."

* * *

"Now that a period of relative economic stability is being approached we believe that normal collective bargaining will have a better chance to function than during the early post-war years. These years were characterized by a rapidly rising cost of living which, as after the First World War, led to labor unrest and acted as an impediment to this process. Individual companies in the steel industry are now pointing out that they have been deprived of the opportunity of explaining their own predicaments in collective bargaining and having their own special problems considered on their merits, regardless of what may be done by other companies which have different circumstances. This is a manifestation of the desire for a return to normal col-

lective bargaining. In view of the provisions of the Labor-Management Relations Act on collective bargaining and the common understanding of the subject, the feeling of these complaining companies is quite justified.

"If a different concept of collective bargaining from that heretofore held is needed, then a study leading to a reappraisal and a redefinition of the terms should be made by the appropriate body, which we think is the Congress itself. We should certainly not undertake to do this, but must limit ourselves to the functions as directed by the President."[16]

The writer subscribes wholeheartedly to the hope that collective bargaining, with as little Government intervention as possible, may be reestablished. He agrees that the trends, described by the Board, that have developed during our fourteen years' experience under a Federal Labor-Management Relations Act necessitate Congressional reconsideration of the permissible scope of collective bargaining units. There must also be considered the extent, if any, to which strikes should be forbidden in the public interest.

These are subjects which have, of course, already been given wide attention, both reasoned and emotional. The few observations that follow are made more with the hope of stimulating thought than of solving problems.

The Scope of the Bargaining Unit

First, let us consider the permissible scope of the collective bargaining unit, with the fact in mind that in steel, coal, railroad transportation, maritime transportation and other fields we have been faced with industry-wide (or union-wide) bargaining. There is little doubt but that the number of labor-management disputes that seriously affect the public interest could be reduced substantially if there were no industry-wide bargaining. Some branches of labor argue that industry-wide bargaining is necessary to give labor an equal voice at the bargaining table. This contention is inherited from those far-off days 15 years ago when

[16] Steel Report, pp. 63–64.

labor was unquestionably still in need of artificial aids in order to bargain with equality. Looking at the problem as of today and from the point of view of the 135 million people in this country who are not directly involved on either side in collective bargaining disputes, it appears not only that labor, largely through its greater political influence, has fully as much power as management but that some reasonable step is necessary to curb excessive union power. Incidentally, another facet of this problem is the stated preference of some employers for industry-wide bargaining, as through trade associations. It is hard to see, however, how monopoly in the field of collective bargaining within any given industry is any less dangerous, in principle, than industry-wide monopoly of the purchase of raw materials or the pricing of products.

The Steel Board indicated that collective bargaining was intended in the Wagner Act to be on at most a company-wide, and usually on no more than a plant-wide, basis. Why not amend the Labor-Management Relations Act to make it an unfair labor practice for either employer or union to bargain on any broader basis than the collective bargaining unit certified by the Board or recognized in the contract, as the case might be, and in no event on a broader basis than company-wide? We have laws designed to keep companies from being bigger than the public interest permits. Is it not implicit that the public interest does not permit employee representation or collective bargaining to be on a bigger scale than the activities of a single company? Such a provision should, among other things, help stop the avowed efforts of left-wing labor to achieve labor cartels in the form of industry-wide bargaining on a continental or hemispheric basis.

Strike Votes

It was originally a fundamental of labor law that the strike was the economic weapon of employees against their employer. It was implicit that before there was a strike they wanted to strike. This

is no longer uniformly the case. For example, mention was made earlier of the 1949 strike by a Local of the United Steelworkers of America in an industry that has no connection with steel and in a plant where the employees and the employer had already gotten together on the substance of a new contract. Many unions recognize the appropriateness of a strike vote as a condition precedent to striking, by requiring such a vote under their constitutions. It is certainly doubtful whether the public should be put to the burden of a strike where the members of the unit themselves are against the strike or where they have had no opportunity to express themselves. Why not make it an unfair labor practice for a collective bargaining unit to strike unless a majority of a quorum of the unit's members voting by secret ballot, under Labor Board supervision, favor the strike? The quorum could perhaps be two-thirds or three-quarters of the members of the unit. There may be a constitutional objection to such a law,[17] but might this not be overcome if it were made clear that the right of individuals to quit would not be involved and that by "strike" is meant only a concerted and purposeful stoppage?

Such a provision might reasonably go further and require that the balloting immediately follow a mandatory forum, lasting perhaps one hour, on company time, under Labor Board supervision, at which management and labor would each have one-half of the time to present its side of the dispute. The voting would then be more intelligent and freer of pressure from either side. Some companies might object to such use of their time and some unions might object to this restriction on their power to summon all their members to strike by a nod or a wink or a word; but the employees would themselves have a larger voice on fuller information and the public would be given some further protection against willful, meaningless or political strikes.

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[17] See *International Union of United Automobile, Aircraft & Agricultural Implement Workers of America (CIO) et al. v. McNally et al.*, 15 Labor Cases 74,158 (Michigan Circuit Court, Wayne County, 1948), and cases there cited; reversed 38 N W 2nd 421, 24 L R R M 2261 (Michigan Supreme Court, 6/29/49); probable jurisdiction noted by U. S. Supreme Court, 12/12/49.

"Emergency" Strikes

These amendments to the Labor-Management Relations Act should help reduce the frequency of "emergency" strikes. There would remain, however, those occasional disputes that threaten serious damage to the public and which for one reason or another cannot or will not be solved through the normal processes of collective bargaining. How to be fair to both labor and management and yet safeguard the public, including the families of those directly affected by such strikes, from suffering losses and waste of calamitous proportions is the problem that for decades has "stumped the experts."

Of course, the Government could move in and impose a settlement either with or without seizure of the properties. This is no solution, however, because all measures of compulsory arbitration, whatever the detailed procedure, lead inexorably towards more and ever more Government control of both business and labor— and more and ever more serious limitations on personal freedom and initiative. The Steel Board fears that the habit of leaning on the Government to solve these differences may already be too firmly entrenched.[18] The consequences are inevitable but they are intangible until they are history. Hence, only a few, like the members of the Steel Board, see the implications.

These are the steps: (1) Government fixes labor costs more and more frequently with political influences too often a real factor and with an unrealistic reliance on mathematical criteria that have a misleading appearance of reliability. The economic consequences are not, or cannot be, foreseen. (2) When the squeeze on a business gets too tight, it either quits or, more likely, goes to the Government for relief in the form of subsidies, reduced taxes or other special favors. (3) Government becomes responsible for the success of business as well as for the security of labor. (4) The time comes, as it has already in Mexico, when labor is shocked to discover that the Government must restrict not only its power to bargain but even its right to demand.

[18] Steel Report, p. 63.

This is a broad brush but fine thinking will supply the details.

The problem is, therefore, how to encourage the collective bargaining process so as to avoid these frightfully costly "emergency" strikes without the loss of freedom—and compulsory arbitration is not the answer. In an effort to achieve the desired result, the Taft-Hartley amendments to the Labor-Management Relations Act incorporated provisions for Fact-Finding Boards without the power of recommendation.[19] The hope was that such Boards would be an aid to collective bargaining where a national emergency was threatened. However, under these amendments, if the Fact-Finding Board disbands without achieving a settlement the parties are left at an impasse with no alternative but the use of their economic weapons—leaving the public even worse off than before. Fact-Finding Boards with the power of recommendation, like the Steel Board, may also be disregarded, as the strike that occasioned this discussion itself shows. One advantage of the Fact-Finding Board procedure over compulsory arbitration, however, is that it does not destroy collective bargaining. It also leaves to labor, in the end, the right to strike, and powerful voices have been heard to say that since the right to strike is "In last resort . . . Its sole effective means of protest,"[20] Labor should not be deprived of this right in any circumstances. I should like to quote, however, these words from Mr. Justice Holmes in his unpublished dissent in the *Hitchman Coal* case:

> "I have no doubt that when the power of either capital or labor is exerted in such a way as to attack the life of the community, those who seek their private interest at such cost are public enemies and should be dealt with as such."[21]

It does seem that in the field of labor relations as in all other fields of life, there must be a point at which the rights of all are more important than the rights of some—a point at which the public interest overrides all private rights—even the right to strike—and,

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[19] Labor-Management Relations Act of 1947, Sections 206–210.

[20] *The Brandeis Guide to the Modern World*, edited by Alfred Lief (1941), p. 150.

[21] Holmes finally concurred in the dissent of Mr. Justice Brandeis in this case. *Hitchman Coal and Coke Co. v. Mitchell*, 245 U. S. 229 (1917). See *Holmes-Pollock Letters* (1941) Vol. II, p. 28.

in fact, the Supreme Court has recently affirmed that the safeguarding of the right to strike in the Labor-Management Relations Act did not operate to legalize a strike creating a national emergency.[22]

However, if the right to strike is to be curtailed in order to prevent emergency strikes, the legislation accomplishing this must not only provide a maximum of incentive for successful collective bargaining but enable labor to participate in the collective bargaining on an equal basis. The other requirement of any such legislation is that it should achieve finality within a reasonable time and on as nearly an economically sound basis as circumstances permit. In this last connection it must be recognized that the Board was stating the obvious when it said that what is a fair wage cannot be decided with mathematical certainty. The same is true of other disputed proposals. There is always in these disputes a range of amounts or of alternative clauses that would produce a fair result.

Furthermore, although Fact-Finding Boards have been widely criticized, the Steel Board's view is quite persuasive that no better means of aiding the processes of collective bargaining in such emergencies has been found. The history of labor-management relations shows quite plainly that it is public opinion that plays the decisive part in deciding what the ultimate settlement shall be—and the reports of Fact-Finding Boards, if on a non-political basis, strongly aid in the formation of informed public opinion. The creation of Fact-Finding Boards, with the obligation to recommend a range within which settlements must be reached, would not, however, of itself be enough. This is true because, first, that would not provide the finality that the public interest requires and, second, both sides would then insist perhaps more stubbornly than ever on obtaining the extreme of the range of possible settlements. Perhaps, however, enough thought has not

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[22] *International Union, U.A.W., A.F.L., Local 232 et al. v. Wisconsin Employment Relations Board, et al.* 93 Law. Ed. 510, 519 (Sup. Ct., Feb. 28, 1949). Justices Black, Douglas, Murphy and Rutledge dissenting.

been given to the possibility of a mandatory Fact-Finding Board which is required to conclude within what range or between which alternatives the settlement must be reached, *plus* provision for a definitive and final conclusion of the issues if, after the Board has made its recommendations, a settlement shall not have been reached within a given time. In order to make this point clearer and more provocative, consider this outline of a possible 5-step procedure. The first 4 steps would be as follows:

1. Any strike in an interstate business that was broadly subject to a Federal regulatory agency and any strike that forced over a given number of men and women out of work would automatically be deemed to be an emergency strike. Supplemental, discretionary power to declare other strikes "emergency strikes" would reside in the President.

2. In such a case, a Fact-Finding Board would be appointed forthwith from a large pre-existing panel by the Senior Circuit Judge in the locality or by the Chief Justice of the Supreme Court where workers in more than one Circuit were involved.

3. The Board, on the 60th day after its appointment, would be required to report the facts and its recommendations as to the ranges within which the settlement should be made. (Thus, on economic issues, such as wages, it would, for example, recommend an increase of from 4¢ to 10¢, or from nothing to 4¢ or a decrease of 2¢ to 6¢ as the range. On non-economic issues it would recommend two alternatives.) A strike or lockout would be barred during these 60 days.

4. After the 60th day, the parties would have 10 days within which to bargain collectively again—this time only within the range or between the alternatives recommended. During this period also there could be no strike or lockout.

The 5th step might take any of a number of forms. The basic assumption would be that if there had been no settlement by the 70th day after the original appointment of the Fact-Finding Board, the public interest in bringing the dispute to a conclusion would be deemed paramount. In other words, from that time on

the emphasis would be on achieving finality. The means to do so, however, should provide the maximum possible incentive to successful collective bargaining during the 10 days between the delivery of the Board's recommendations and the 70th day. As an example, the 5th step might be for the Senior Circuit Judge of the Circuit where the company has its principal place of business to assign the dispute, by lot, to one of his District Court Judges for decision within the range, or between the alternatives, recommended by the Fact-Finding Board. This should be on the basis of the Board's report, without further hearing, and the District Court Judge should be required to render his decision within a minimum of time—for example, not more than 5 days and preferably 3. The result would be quick and the opinion, if any, not over scholarly but pressure would be minimized, political factors would be greatly reduced, and the Board's range would keep the decision within the bounds of approximate fairness.

So much thought has been given to this problem and with so little success that we should not hesitate to consider novel procedures. One such worthy of more than cursory rejection would be the traditional sporting manner of solving the insoluble—namely a flip of the coin. A responsible neutral person might publicly flip a coin on the 70th day, with the winner of the toss automatically gaining the extreme most favorable to it within the range of the Board's recommendation. The incentive under such a procedure would be great for successful collective bargaining during the 10-day period, for the price to either party of not reaching an agreement would be the risk of losing all. Here again, the Fact-Finding Board's fixing of the range would prevent an extreme result.

In either of these circumstances, the statute should probably provide that the settlement so arrived at would be embodied in a Federal Court Decree for purposes of enforcement.

But, it may properly be asked, is not such a procedure really the same as compulsory arbitration? For two basic reasons they are not the same.

In the first place, fact finding, when objective and as free as possible from current political pressures, should be, as its name implies, an aid to collective bargaining. In situations where the public should not be burdened with strikes, proper fact finding should aid in avoiding threatened strikes by narrowing the issues and helping to marshal sounder public opinion. Fact finding alone, however, leaves the ultimate result to collective bargaining. Its weakness where a strike emergency is threatened is lack of finality, just as the weakness of compulsory arbitration is a government-imposed finality.

In the second place, the procedures suggested above put the decision out of the hands of current government, which is thereby freed from responsibility for the result. Finality of some sort there must be in such situations, but it would seem that current government officials should be kept as far as possible from either influencing the result or having responsibility for it. At the same time, these procedures afford finality but, unlike any arbitration or labor court, meanwhile put a premium on successful bargaining.

It would perhaps be possible to find so strong an incentive for reaching an agreement by collective bargaining that no other finalizing would be necessary. Such an approach would be based on the theory that both parties to a prolonged inability to settle their economic differences are, as Holmes suggested, to a substantial degree responsible and that where their inability to agree threatens an emergency, they should both be punished, both as an inducement to agreement and as a penalty for flouting the public welfare. Thus it might be provided that where a labor dispute occurs in certain dangerous areas, such as utilities or transportation, or on a dangerous scale, the parties should be required to give notice of the dispute and to settle their differences within a given period such as 60 days on penalty at that time and thereafter of a severe fine levied on both sides for each 10 days that no settlement is reached. No strike or lockout would be permitted. The penalty, whether against the Union and Com-

pany, or against their respective officers, should, under such a law, be fixed by statute on a basis that puts as equal as possible pressure on both sides to settle. Even suggesting such a procedure might seem extreme but it is submitted that every possibility must be proposed, considered, criticized and debated if a sound procedure for avoiding these periodic impasses is to be avoided.

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SELECTED ACQUISITIONS, 1949

The busy practitioner, immersed in the literature of his own specialized field, finds it increasingly difficult to cultivate other subjects of the law. An attempt to overcome the difficulty is made in this compilation of recent acquisitions representing the many varieties and interests of the law, making perhaps for that "ideal combination of books and lawyers."*

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